HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

3rd Report of Session 2013-14

Public Bodies Order:

Draft Public Bodies (Abolition of BRB (Residuary) Limited) Order 2013

Statutory Instrument:

Draft Water Industry (Specified Infrastructure Projects) (England Undertakers) Regulations 2013

Also includes 2 Information Paragraphs on 3 Instruments

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Secondary Legislation Scrutiny Committee (formerly Merits of Statutory Instruments Committee)

Historical Note

In January 2000, the Royal Commission on the Reform of the House of Lords said that there was a good case for enhanced Parliamentary scrutiny of secondary legislation and recommended establishing a "sifting" mechanism to identify those statutory instruments which merited further debate or consideration. The Merits of Statutory Instruments Committee was set up on 17 December 2003. At the start of the 2012-3 Session the Committee was renamed to reflect the widening of its responsibilities to include the scrutiny of Orders laid under the Public Bodies Act 2011.

The Committee has the following terms of reference:

(1) The Committee shall, with the exception of those instruments in paragraphs (3) and (4), scrutinise—

- (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
- (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (2).

(2) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

- (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
- (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
- (c) that it may inappropriately implement European Union legislation;
- (d) that it may imperfectly achieve its policy objectives.

(3) The exceptions are—

- (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
- (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
- (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(4) The Committee shall report on draft orders and documents laid before Parliament under section 11(1) of the Public Bodies Act 2011 in accordance with the procedures set out in sections 11(5) and (6). The Committee may also consider and report on any material changes in a draft order laid under section 11(8) of the Act.

(5) The Committee shall also consider such other general matters relating to the effective scrutiny of secondary legislation and arising from the performance of its functions under paragraphs (1) to (4) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

Lord Bichard	Baroness Hamwee	Lord Plant of Highfield
Lord Blackwell	Lord Methuen	Rt Hon. Lord Scott of Foscote
Lord Eames	Rt Hon. Baroness Morris of Yardley	Lord Woolmer of Leeds
Rt Hon. Lord Goodlad *(Chairman)*	Lord Norton of Louth	

Registered interests

Information about interests of Committee Members can be found in Appendix 2.

Publications

The Committee's Reports are published on the internet at www.parliament.uk/seclegpublications

Information and Contacts

If you have a query about the Committee's work, or opinions on any new item of secondary legislation, please contact the Clerk of the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email seclegscrutiny@parliament.uk.

Statutory instruments

The National Archives publishes statutory instruments on the internet at http://www.legislation.gov.uk/, together with a plain English explanatory memorandum.

Third Report

PUBLIC BODIES ORDER

A. Draft Public Bodies (Abolition of BRB (Residuary) Limited) Order 2013

Introduction

1. The draft Public Bodies (Abolition of BRB (Residuary) Limited) Order 2013 ("the Order") was laid on 15 May 2013 under section 1 of the Public Bodies Act 2011 ("the 2011 Act"). The Order was laid by the Department for Transport (DfT) with an Explanatory Document (ED). No Impact Assessment has been provided for the transfer of functions but an assessment of projected savings is included in the ED. Two Impact Assessments have been prepared in relation to the transfer of activities to Network Rail Infrastructure Limited ("Network Rail") and the Rail Safety and Standards Board Limited (RSSB).

Overview of the proposal

2. The purpose of this draft Order is to abolish BRB (Residuary) Limited ("BRB Residuary") and transfer its functions to the Secretary of State for Transport and Network Rail (Assets) Limited. The Government are also proposing to make a Transfer Scheme (under section 23 of the 2011 Act) which will transfer BRB Residuary property, rights and liabilities to Network Rail, London and Continental Railways Limited (LCR), the RSSB and to the Secretary of State for Transport. A draft of the BRB (Residuary) Transfer Scheme is attached as Annex 2 to the Order. It is proposed that the Transfer Scheme should have effect on the same day as the Order comes into force. The Transfer Scheme will be laid before Parliament after being made. DfT intend the abolition to take place on or after 30 September 2013.

Background

3. BRB Residuary is a private company limited by shares which was incorporated on 24 January 2001 in England and Wales. It is wholly owned by the British Railways Board (BRB) which is a statutory corporation established under the Transport Act 1962. BRB Residuary was incorporated to hold and manage the property, rights and liabilities of the BRB following privatisation with three main areas of responsibility:

- ownership and management of a diverse property portfolio consisting of around 100 operational and non-operational sites and a handful of administrative offices tenanted for the most part by other Government departments;
- management of industrial injury claims by former BRB employees; and
- ownership and maintenance of approximately 3,400 structures such as bridges, tunnels and viaducts across England, Scotland and Wales which are no longer part of the operational railway.

Argument for abolition

4. The 2010 Public Bodies Review applied the general principle that public bodies should only exist at arm's length from ministers where the body is required to perform a technical function, requires impartiality and is needed to establish facts independently. The Government concluded that the BRB Residuary met none of these tests and should therefore be abolished (ED paragraph 7.2). The Department further argues that, since BRB Residuary was established to discharge certain residual functions of the BRB following its privatisation, it was always the intention that it should be wound up at an appropriate time. According to the Department, the 2011 Act provides an opportunity to transfer BRB Residuary's property, rights and liabilities "in an efficient and cost effective way" to appropriate successor bodies within the DfT umbrella that can now offer the same service more efficiently (ED paragraph 7.3).

Role of the Secondary Legislation Scrutiny Committee

5. The Committee's role, as set out in its Terms of Reference, is to "report on draft orders and documents laid before Parliament under section 11(1) of the 2011 Act in accordance with the procedures set out in sections 11(5) and (6)". A key aspect of this role is the Committee's power to trigger the enhanced affirmative procedure which would require the Government to have regard to any recommendations made by the Committee during a 60-day period from the date of laying. The Committee may also take oral or written evidence, to aid its consideration of the orders.

Statutory Consultation

6. The Government have carried out consultation in accordance with section 10 of the 2011 Act, between 15 May and 9 July 2012 (just over seven weeks). The consultation was directed to 274 organisations known to have an interest and was also available to the general public on-line. There were 29 responses and very little dissent. Issues relating to the destination of particular properties and certain intellectual property rights were resolved, as were some concerns about the maintenance of road bridges. BRB Residuary was also fully engaged in the consultation process and there has also been consultation with the 44 remaining BRB Residuary staff and their unions. (ED Section 8 and Annex 1 to the Order)

Other Tests in the Public Bodies Act 2011: assessment of the proposals

7. A Minister may only make an order under sections 1 to 5 of the 2011 Act if he considers that the order serves the purpose of improving the exercise of public functions, having regard to (a) efficiency, (b) effectiveness, (c) economy, and (d) securing appropriate accountability to Ministers (section 8 of the 2011 Act).

Efficiency

8. The ED explains that, since it was established in 2001, BRB Residuary has divested itself of more than 90% of the property it inherited. The reduced scale of operations means it is no longer viable as a separate entity and it would be more efficient to transfer its residual liabilities and functions to other railway bodies, which are already carrying out similar activities (ED

paragraph 7.21(i)). A Table at paragraph 7.14 of the ED sets out the remaining items and their destination.

Effectiveness

9. The recipient bodies are well established in the relevant area of activity and have the necessary technical expertise to handle the acquired items. Some 35 experienced staff will also be transferred. The ED states that the transfer will enable streamlining of working practices and a reduction in overheads. (ED paragraph 7.21 (ii))

Economy

10. The ED states that the absorption of current activities into existing bodies will relieve the burden on the taxpayer and may lead to some additional efficiency gains for example from better use of office accommodation. Savings of £2.4 million a year are anticipated from the abolition of BRB Residuary. There will be some offsetting transitional costs, estimated at about £0.6 million, which include redundancy costs for five staff who will not be transferred (ED paragraph 7.21 (iii)). The Impact Assessments attached to the draft Transfer Scheme indicate that that part will be cost neutral.

Accountability

11. The transfer will result in the remaining property, rights and liabilities being transferred in one of three ways: directly to the Secretary of State for Transport, or to companies wholly owned by the DfT, or to agencies responsible to the Secretary of State. The ED therefore states that there is no reduction in accountability to Ministers – the responsibilities are simply differently distributed. (ED paragraph 7.21 (iv))

Safeguards

12. The Minister considers that the conditions in section 8(2) of the Act are similarly satisfied as all functions, liabilities and obligations of BRB Residuary are being transferred to other organisations under his aegis. Abolition does not remove any necessary protections nor does it affect the exercise of any legal rights or freedoms either directly or indirectly. (ED paragraph 7.22)

Conclusion

13. The Government present a convincing argument that the overall effect of the transfer of the remaining functions, property, rights and liabilities of BRB Residuary to other established organisations will allow economies without any loss of rights or protections and may improve efficiency. **We conclude that the Government have demonstrated that the draft Order serves the purpose of improving the exercise of public functions and complies with the test set out in the 2011 Act. We are therefore content to clear the Order within the 40-day affirmative procedure.**

INSTRUMENTS DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instrument and has determined that the special attention of the House should be drawn to it on the grounds specified.

B. Draft Water Industry (Specified Infrastructure Projects) (England Undertakers) Regulations 2013

Date laid: 15 May
Parliamentary Procedure: affirmative

Summary: The draft Regulations allow the creation of Infrastructure Providers (IPs), regulated by Ofwat, to finance and deliver large water or sewerage infrastructure projects. The immediate impetus behind the presentation of the Regulations is the proposed construction of Thames Tideway Tunnel, and the manner in which that project would be financed by Thames Water. Knowledge of this project has coloured responses to the Government's consultation exercises. However, the Government stress that the Regulations are generic and would apply to all water and sewerage companies and large infrastructure projects that meet the criteria.

We draw these Regulations to the special attention of the House on the ground that they give rise to issues of public policy likely to be of interest to the House.

14. The Department for Environment, Food and Rural Affairs (Defra) has laid these Regulations, with an Explanatory Memorandum (EM) and impact assessment (IA). They enable the creation of Infrastructure Providers (IPs), regulated by the Water Services Regulation Authority (Ofwat), to finance and deliver large water or sewerage infrastructure projects. They provide for the procuring, licensing and regulating of an IP that is separate from a water or sewerage company; and they set out how the Secretary of State and/or Ofwat specify which projects should be subject to these rules, and how they designate the company which is to become an IP licensed by Ofwat.

15. In the EM, Defra states that the Regulations are generic and apply to all water and sewerage companies and large infrastructure projects that meet the criteria. It adds, however, that within the next ten years the Regulations are expected to affect the proposed Thames Tideway Tunnel,[1] and that they would enable Thames Water Utilities Ltd ("Thames Water") to tender competitively an Ofwat-regulated IP to finance and deliver the project.

16. Defra says that the objective is to help deliver necessary large infrastructure projects such as the Thames Tideway Tunnel whilst containing and minimising risks to undertakers, customers and UK taxpayers. The policy is to create a parallel regulatory regime for delivering such infrastructure which provides value for money for customers and safeguards the ability of undertakers to continue delivering their required level of existing services;

[1] See: http://www.thamestidewaytunnel.co.uk/ : "The Thames Tideway Tunnel is a major new sewer, that will help tackle the problem of overflows from the capital's Victorian sewers and will protect the River Thames from increasing pollution for at least the next 100 years."

and also to help promote innovation in the financing and delivery of such infrastructure projects in future.

17. Defra states that two other options to achieve these objectives were also considered:

- the first was to maintain the existing position, whereby water or sewerage companies continue to finance and deliver all water and sewerage infrastructure projects under the existing regulatory regime. This was rejected, because Ofwat would not have an objective means of testing whether the financing costs of a proposed infrastructure project were appropriate or reasonable; and also because the existing level and cost of services which customers receive could be detrimentally affected by undertakers having to include the financing and delivery of a large project, for example, by increasing the cost of capital for all of an undertaker's agreed projects which is subsequently passed onto customers;
- under the second option, Ofwat would make changes to an undertaker's appointment conditions, so as to require the financing and delivery of a large project to be put out to tender. This was rejected for three reasons: because Ofwat would either have to agree or impose changes to an undertaker's operating licence, and this could be a lengthy process with no guarantee of a successful outcome; because it is not possible to establish a directly regulated separate IP with this option, and the project would not be ring-fenced from the rest of the undertaker's activities as effectively as is achieved by these Regulations; and because, since the activities (and the associated risks) of the IP could not be ring-fenced from the activities of the undertaker, the existing level and cost of services which customers receive could be detrimentally affected by an undertaker having to include the financing and delivery of one large project.

Consultation

18. As Defra explains in the EM, there have been two public consultations on the Regulations. An initial 12-week public consultation was carried out between February and May 2011, and a summary was published in September 2011.[2] 13 replies were received: ten were from water companies; the others were from Water UK, the Institute of Civil Engineers (ICE) and the Consumer Council for Water. The consultation proposed two criteria that would require a project to be put out to tender: that the project is of a size or complexity that threatened the responsible undertaker's ability to provide services for its customers; and that specification of the project as a special infrastructure project was likely to result in better value for customers than would otherwise be the case. In the summary, Defra states that the majority of respondents broadly supported both criteria, but stressed the need for clarity and certainty on how the criteria would be applied.

19. The second consultation, which included draft Regulations and an Impact Assessment, ran for four weeks in November and December 2012; a summary was published in March 2013.[3] In this case, seven responses were received; only one of these was from a water company; two were from

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[2] See: http://www.defra.gov.uk/consult/2011/02/22/water-sewerage-infrastructure-england-1102/

[3] See: http://www.defra.gov.uk/consult/2012/11/05/water-sewerage-infrastructure-england-phase2/

individuals; two were from MPs; and the others were from an NGO and a local community group. As Defra's EM makes clear, responses to this second consultation, which are published in the annex to the summary, included a good deal of criticism of the proposals.

20. We note, in particular, that Mr Damian Hinds, MP, called for the draft Regulations to be suspended "pending a full review of the project itself – about which I understand doubts have been expressed by professionals and experts as to its being fit for purpose - and also its financing". We also note that Mr Simon Hughes, MP, said that the Regulations were unnecessary; and that the desired objectives of the scheme could be met by varying the licence of Thames Water to allow it to create a subsidiary to carry out the tunnel. "The reason why Thames cannot fund and finance the tunnel itself is not because of the complexity of the scheme but because of the poor financial position of the company. Allowing the creation of a special purpose company to build the company would absolve Thames Water's shareholders of the responsibility for these decisions which have put Thames in this position. This would not be in the public interest."

Conclusion

21. While the Regulations are generic in their potential application, the immediate impetus behind their presentation by Defra, and their principal salience in the eyes of most respondents to the second consultation, is the proposed construction of Thames Tideway Tunnel, and the manner in which that project would be financed by Thames Water. Concerns about this specific project are bound to colour consideration of the draft Regulations.

22. However, the House will wish to bear in mind the Department's statement that the proposed instrument is intended to enable any water and sewerage company in England to undertake large infrastructure projects without threatening their ability to meet their statutory service provision obligations. It also states that the current regulatory framework ensures that water and sewerage companies do not make excessive payments to shareholders, and that customers' bills are kept as low as possible while recognising that the companies must attract appropriate investment to meet future needs.

OTHER INSTRUMENTS OF INTEREST

Energy Supply Company Administration Rules 2013 (SI 2013/1046)

Energy Supply Company Administration (Scotland) Rules 2013 (SI 2013/1047)

23. These Regulations, laid by the Department for Energy and Climate Change (DECC), implement provisions in the Energy Act 2011 for a special administration regime for energy supply companies in England and Wales (SI 2013/1046) and in Scotland (SI 2013/1047). The purpose of the administration regime is to ensure that, if a large gas or electricity supply company is in financial difficulty, arrangements can be put in place to allow the company to continue operating until it is either rescued, sold, or its customers transferred to other suppliers.

24. We obtained further information from DECC about aspects of the drafting of the Regulations: this is enclosed as Appendix 1.

Penalties for Disorderly Behaviour (Amount of Penalty) (Amendment) Order 2013 (SI 2013/1165)

25. The Government, in their response to the consultation *'Getting it right for victims and witnesses',* undertook to increase both lower and higher tier Penalty Notices for Disorder (PNDs) by £10 and to use the additional revenue to support victims' services. Penalties currently set at £50 and £80 will therefore increase to £60 and £90 respectively from 1 July 2013. The PentiP penalty ticket processing system recently introduced across police forces in England and Wales will allow identification of paid PNDs and for the additional £10 from each notice to be transferred for use in funding victims' services. The Treasury has agreed to this arrangement, subject to an annual limit of £30 million, any additional money over and above this will revert to the Consolidated Fund.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft Instruments subject to affirmative approval

Child Support and Claims and Payments (Miscellaneous Amendments and Change to the Minimum Amount of Liability) Regulations 2013

Education (Amendment of the Curriculum Requirements for Second Key Stage) (England) Order 2013

Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Referral Fees) Regulations 2013

Instruments subject to annulment

SI 2013/1046	Energy Supply Company Administration Rules 2013
SI 2013/1047	Energy Supply Company Administration (Scotland) Rules 2013
SI 2013/1105	Building (Amendment) Regulations 2013
SI 2013/1115	Merchant Shipping (Categorisation of Registries or Relevant British Possessions) (Amendment) Order 2013
SI 2013/1116	G8 Summit (Immunities and Privileges) Order 2013
SI 2013/1129	Chemical Weapons (Licence Appeal Provisions) (Revocation) (No. 2) Order 2013
SI 2013/1138	Gas and Petroleum (Consents) Charges Regulations 2013
SI 2013/1139	Welfare Reform Act 2012 (Consequential Amendments) Regulations 2013
SI 2013/1142	Social Security (Contributions) (Amendment No. 2) Regulations 2013
SI 2013/1162	Financial Conglomerates and Other Financial Groups (Amendment) Regulations 2013
SI 2013/1165	Penalties for Disorderly Behaviour (Amount of Penalty) (Amendment) Order 2013
SI 2013/1169	Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013
SI 2013/1185	Qualifications for Appointment of Members to the First-tier Tribunal and Upper Tribunal (Amendment) Order 2013
SI 2013/1187	First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2013
SI 2013/1188	Tribunal Procedure (Amendment No. 3) Rules 2013

APPENDIX 1: ENERGY SUPPLY COMPANY ADMINISTRATION RULES 2013 (SI 2013/1046) AND THE ENERGY SUPPLY COMPANY ADMINISTRATION (SCOTLAND) RULES 2013 (SI 2013/1047)

Information from the Department for Energy and Climate Change

All references are to SI 2013/1046 (The Energy Supply Company Administration Rules 2013 for England and Wales) unless stated otherwise.

Q1: do the provisions on priority of expenses in 36(1)(c) of SI 2013/1046 rely on there being a court order in relation to costs?

A1: Yes – costs would be awarded to the applicant and any person appearing at the hearing of the application by a court order, and, unless otherwise agreed between the energy administrator and the person entitled to payment, the amount of costs would be decided by a costs officer under the detailed assessment procedure set out in the Civil Procedure Rules Part 47(see further below).

Q2: If so, why is this not mentioned (as is the case in SI 2013/1047)?

A2: Rule 36(1)(c) ("priority of expenses of energy supply company administration") sets out where the costs of the applicant and any person appearing at the hearing come in order of priority of the expenses in an energy supply company administration.

Rule 12(3) ("the hearing") sets out that if a court makes an energy supply company administration order, the costs of the applicant and of any person whose costs are allowed by the court, are payable as an expense of the energy supply company administration. It is clear from rule 12(3) that if the court does not allow a person's costs, then that person's costs are not an expense of the energy supply company administration, and so rule 36(1) does not apply to them.

Rule 113(1) sets out that where costs of any person are payable as an expense of the energy supply company administration, the amount is to be decided by the detailed assessment procedure unless otherwise agreed between the energy administrator and the person entitled to payment.

Under Rule 113(2) the energy administrator may serve notice on the person entitled to payment requiring them to commence detailed assessment proceedings in accordance with the Civil Procedure Rules (for England and Wales) Part 47. Rule 113(3) sets out that these proceedings must be commenced in the court to which the energy supply company administration proceedings are allocated.

Q3: how is the reference to "the prescribed part" in SI 2013/1046 to be understood if that term is not further explained in the SI?

A3. Rule 207, Part 16 ("Interpretation and Application") defines the term "prescribed part" for the purpose of SI 2013/1046 as having the same meaning as it does in section 176A(2) of the Insolvency Act 1986 and the Insolvency Act 1986 (Prescribed Part) Order 2003.

Section 176A (2) of the Insolvency Act 1986 (as amended by paragraph 41, Schedule 20 of the Energy Act 2004 and s.171 and s. 96 of the Energy Act 2011) allows the energy administrator to set aside an amount of money out of the energy supply company's property to satisfy the claims of unsecured creditors. The Insolvency Act 1986 (Prescribed Part) Order 2003 sets out the method for calculating this amount.

Q4: Why are the fuller provisions of SI 2013/1047 not replicated there?

A4. Rule 69 of SI 2013/1047 specifies the information needed to accompany an application under s.176A(5) of the Insolvency Act 1986 to disapply section 176A. Rule 97 of SI 2013/1046 makes equivalent provision.

Rule 70 of SI 2013/1047 relates the giving notice of a court order under s.176A(5). Rule 200 of SI 2013/1046 makes equivalent provision.

In general, SI 2013/1046 follows the approach of the Insolvency Rules for England & Wales (SI 1986/1925), and SI 2013/1047 follows the approach of the Insolvency Rules for Scotland (SI 1986/1915).

23 May 2013

APPENDIX 2: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 4 June 2013 Members declared the following interests:

Draft Education (Amendment of the Curriculum Requirements for Second Key Stage) (England) Order 2013

Lord Woolmer as Member, International Advisory Board, White Rose East Asia Centre, which subsumes the National Institute of Chinese Studies and the National Institute of Japanese Studies

Attendance:

The meeting was attended by Lord Bichard, Lord Eames, Lord Goodlad, Baroness Hamwee, Lord Methuen, Baroness Morris of Yardley, Lord Plant of Highfield, Lord Scott of Foscote and Lord Woolmer of Leeds.